May 14, 1956
Opinion No. 56-99

REQUESTED BY: Honorable Clarence A. Carpenter
State Senator

OPINION BY: ROBERT MORRISON, The Attorney General
H. B. DANIELS, Assistant Attorney General

QUESTION 1: Is the immunity of the State for negligence waived by Chapter 153, Laws of 1956, Second Regular Session?

CONCLUSION: No.

QUESTION 2: What name should be used on the contract of insurance?

CONCLUSION: The policy should name the state, board, department or agency as the assured.

Chapter 153, Laws of 1956, 2nd Regular Session, 22nd Legislature, State of Arizona, reads as follows:

"RELATING TO LIABILITY INSURANCE FOR OFFICERS, AGENTS AND EMPLOYEES OF THE STATE AND THE BOARDS, DEPARTMENTS AND AGENCIES CARRYING ON ANY OF THE FUNCTIONS OF THE STATE, MAKING AN APPROPRIATION, AND AMENDING CHAPTER 4, TITLE 38, ARIZONA REVISED STATUTES, BY ADDING ARTICLE 3.

Be it enacted by the Legislature of the State of Arizona:

Section 1. Chapter 4, title 38, Arizona Revised Statutes, is amended by adding Article 3 to read:

ARTICLE 3. LIABILITY INSURANCE

38-641. Authority to procure liability insurance covering officers, agents and employees

The state and the boards, departments and agencies carrying on any of the functions thereof may expend public funds to procure liability insurance covering their officers, agents and employees while employed in governmental or proprietary capacities.

Sec. 2. Appropriation

A. The sum of ten thousand dollars is appropriated from the game and fish protection fund for the use of the game and fish commission in carrying out the provisions of section 1 of this act.

B. The sum of twenty-five thousand dollars is appropriated from the state highway fund for the use of the state highway commission in carrying out the provisions of section 1 of this act."

This Act provides, in substance, that the state, its boards, departments or agencies may expend public funds to purchase liability insurance for its officers, agents and employees while employed in governmental or proprietary capacities. In addition, the measure provides appropriation for two state agencies for the purpose set out in Section 1.

In answer to your first question, we state the well-settled rule that the state, in consequence of its sovereignty, is immune from prosecution in the courts and from liability to response for damages for negligence, except in those cases where it has expressly waived immunity or assumed liability by constitutional or legislative action. State v. Sharp, 21 Ariz. 424, 426.

In the Sharp case, supra, the legislature had passed the statute giving the court jurisdiction to hear an action on claims for contract, or for negligence, when disallowed by the auditor. The question of whether the state waived its immunity was raised. The court answered this question by saying that immunity from action is one thing, but immunity from liability is another. Therefore, the state does not waive its immunity from liability for the negligence of its servants or agents by conferring jurisdiction to hear an action upon a court.

Based on the above principle, it is the opinion of this office that the legislature did not waive the state's immunity from liability for negligence of its agents, servants or employees in the performance of governmental functions by giving authority to its agencies to purchase liability insurance. The state would, in any case, be liable for the negligence of its employees in the performance of a proprietary function.

On the question of what name should be used in the policy, our Supreme Court has made some comment on it. In Hartford Accident Etc. Co. v. Wainscott, 41 Ariz. 439, at page 443, the Arizona Supreme Court said:

> "* * * We think the first contention of plaintiff is somewhat hypertechnical. Even though it be true that the policy should have named the assured as 'Maricopa County', yet it was well known by all of the parties that the motor vehicles covered by the policy were owned by Maricopa county, and that the purpose of the policy was to insure the county against any liability imposed by

law upon it, and the insuring corporation collected the premium with full knowledge of that fact. Under these circumstances, if any liability on the part of Maricopa county arose for any of the acts covered by the policies, the insurers would certainly be estopped from contending that the mistake in the legal name of the assured affected their liability."

It is, further, the opinion of the Department of Law that the policy of liability insurance should name the state, board, department or agency covered; however, in the opinion of this office, the liability could not be avoided by the insurer if he knew that he was issuing liability insurance to cover the agency, notwithstanding the fact a member thereof was named as the assured.

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